**UNITED STATES GOVERMENT**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| CHICAGO MATHEMATICS AND SCIENCE ACADEMY CHARTER SCHOOL, INC., | ) | |
| Petitioner-Employer, | ) | |
| - and - | ) | Case No. 13-RM-1768 |
| CHICAGO ALLIANCE OF CHARTER TEACHERS AND STAFF, IFT, AFT, AFL-CIO, | ) | |
| Respondent-Union. | ) | |

# PETITIONER-EMPLOYER'S BRIEF

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**PETITIONER-EMPLOYER'S BRIEF**

Pursuant to Section 102.67(g) of the Rules and Regulations of the National Labor Relations Board ("Board" or "NLRB"), and the Board's January 10, 2011 Notice and Invitation to File Briefs, the Chicago Mathematics and Science Academy Charter School, Inc. ("CMSA"), hereby submits this Brief for the Board's consideration in the above-captioned matter. On January 10, 2011, the Board granted CMSA's Request for Review, and invited the parties and interested *amici* to file briefs that address the following issue: "whether the Employer-Petitioner, a charter school, is a political subdivision within the meaning of Section 2(2) of the Act, and therefore exempt from the Board's jurisdiction." As explained in CMSA's Request for Review (which is hereby

incorporated by reference),[1] CMSA meets neither prong of the test for "political subdivision" status under the National Labor Relations Act ("NLRA" or "Act"), because CMSA: (1) was not created directly by the State of Illinois so as to constitute an arm of state government; and (2) is not administered by individuals who are responsible to public officials or to the general electorate. *See Charter Sch. Admin. Servs., Inc.*, 353 N.L.R.B. 394, 397 (2008) (outlining two-part test for "political subdivision" status).

In concluding otherwise, the Acting Director for Region 13 erroneously relied on the Illinois Charters School Law, which characterizes Illinois charter schools as "public," *see* 105 ILCS 5/27A-5, and the Illinois Educational Labor Relations Act, which lists charter schools within its definition of an "educational employer." *See* 115 ILCS 5/2(a). As will be explained below, undue reliance on such statutory definitions for determining "employer" status is improper pursuant to U.S. Supreme Court precedent. Moreover, such reliance is highly inappropriate from a policy perspective, due to the unpredictability of local state politics. As recent events demonstrate, states can easily change statutory

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[1] A summary of the facts introduced during the hearing below is included in CMSA's Request for Review. As explained in that Request for Review, the record evidence is largely uncontested, with the Union failing to call a single witness to rebut the facts introduced during the Employer's case-in-chief. Specifically, the Union never once contested the estimated amount that CMSA spent on goods and services over the last fiscal year. As a result, it is undisputed that CMSA meets the Board's discretionary jurisdictional standards.

language in accord with shifting political majorities. *See* Karen Tumulty, *Wisconsin Governor Wins his Battle with Unions on Collective Bargaining*, WASH. POST, Mar. 11, 2011; Steven Greenhouse, *Strained States Turning to Laws to Curb Labor Unions*, N.Y. TIMES, Jan. 3, 2011 (summarizing state initiatives to limit public sector collective bargaining rights as being spearheaded by new political leadership).

In light of this unpredictability, employers nationwide would be left constantly questioning whether they fall within the purview of state, local or federal labor law if the Board was to give dispositive weight to a state's own declaration about an employer's governmental status. In effect, state and local legislatures would become the proverbial "tail" that wags the NLRB's jurisdictional "dog." As a result, the NLRB – as well as the parties – would never know from election cycle to election cycle whether a particular employer qualifies for the Act's coverage, due to the whims of a state or local legislative body.

Historically, the NLRB has had little patience for states that pass legislation that impacts national labor law, as highlighted by the Board's recent challenge to several state constitutional amendments that seek to preserve an employee's right to a secret ballot election. *See* NLRB General Counsel News Release, *NLRB advises Attorneys General in four states that secret-ballot amendments are preempted by*

*federal labor law* (Jan. 14, 2011). As a result, the mere fact that Illinois' General Assembly has defined CMSA as a "public" school, or has characterized CMSA as an "employer" for state labor law purposes, cannot be dispositive of CMSA's "political subdivision" status within the meaning of Section 2(2) of the Act.

Alternatively, the Acting Regional Director gave undue weight to the twin findings that CMSA (1) must comply with government regulations; and (2) and receives a majority of its operating funds from governmental sources. The Board, however, already has rejected the notion that the mere receipt of government funds qualifies an employer for "political subdivision" status. *See Family Healthcare, Inc.*, 354 N.L.R.B. No. 29 (2009) (employer not a "political subdivision" despite the fact that it derived over 80 percent of its funding from government grants and Medicare and Medicaid reimbursements). Moreover, it is not unusual for government contractors to receive a majority of their operating revenue from government entities. *See, e.g.*, GRANT THORNTON, 16TH ANNUAL GOVERNMENT CONTRACTOR INDUSTRY SURVEY HIGHLIGHTS BOOK at 5 (2010) (responding contractors reported that, on average, 94% of their revenue came from federal agencies). It is also well-established that almost every federal, state and local government contractor must abide by various levels of government oversight. *Cf. Charter Sch. Admin. Servs., Inc.*, 353 N.L.R.B. at 398 n. 20 ("It would be the rare government contract that did not afford the government oversight of

the contract . . . .). Thus, if government oversight and the receipt of government revenue were the determinative factors as to "political subdivision" status, thousands of private sector government contractors around the country would suddenly be removed from the NLRB's jurisdiction.

This result is inconsistent with the evolution of the NLRB's test for "political subdivision" status. In this respect, the Board has consistently narrowed the scope of this statutory exception. Whereas the NLRB used to broadly interpret the meaning of "political subdivision" by employing the "intimate connection test," the Board now applies the two-part *Hawkins County* test in a very literal sense. As seen in *Charter Sch. Admin. Serv.*, unless (1) an employer *literally* was created by a government entity, or (2) the employer's governing board is subject to appointment and/or removal by a government entity, "political subdivision" status will not be found.

By limiting the meaning and application of the term "political subdivision" in such a way, the NLRB has helped to maximize the number of employees that will enjoy the protections of the NLRA, while simultaneously minimizing the number of employees whose collective bargaining rights are subject to the whim of state and local legislative bodies. *See Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) ("administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny

protection to workers the Act was designed to reach"). CMSA respectfully submits that there is no legal or policy reason for the Board to now reverse course by expanding the test for determining "political subdivision" status within the meaning of Section 2(2) of the Act.

## ARGUMENT

### I. The Acting Regional Director Erred By Giving Weight To Illinois Statutes That Identify Charter Schools As "Public," And That Subject Charter Schools To Illinois' Public Sector Labor Law

The Acting Regional Director erred in finding that CMSA qualifies as a "political subdivision" within the meaning of the first prong of the *Hawkins County* test for "political subdivision" status. The NLRB has defined an "employer" as an entity that "controls *some* matters relating to the employment relationship" involving petitioned-for employees. *See Management Training Corp.*, 317 N.L.R.B. 1355, 1358 (1995) (emphasis added). In this case, CMSA controls literally *all* of its employees' basic terms and conditions of employment, including but not limited to wages, health insurance, hiring, work hours and discipline. As a result, CMSA meets the definition of "employer" under the NLRA, unless it somehow falls within one of the limited exceptions outlined in Section 2(2) of the Act. *See* 29 U.S.C. § 152(2). One of those limited exceptions involves a "State or political subdivision thereof." *Id.*

According to the U.S. Supreme Court, an entity is exempt from Board jurisdiction under the "political subdivision" exception if it is either: (1) created *directly* by the State so as to constitute a department or arm of the government; or (2) administered by individuals who are responsible to public officials or to the general electorate. *See NLRB v. Natural Gas Utility Dist. of Hawkins County*, 402 U.S. 600, 604-05 (1971). The NLRB and its Administrative Law Judges ("ALJ") have consistently applied the first prong of the *Hawkins County* test to only those situations where a government entity literally has "created" an employer via some type of statutory proclamation; the fact that private individuals have sought to establish an organization via a statutory application process is not enough. *See, e.g., Research Found. Of the City Univ. of N.Y.*, 337 N.L.R.B. 965, 965 (2002) (entity was not a "political subdivision," where a group of private individuals requested incorporation as a not-for-profit entity); *Excalibur Charter Sch., Inc.*, 2011 NLRB LEXIS 23 at *7 (NLRB ALJ 2011) (charter school was not created by the state, where state statute merely "established a framework and rules by which individuals could establish charter schools that were subject to approval by state officials"); *C.I. Charter Wilson Academy*, 2002 NLRB LEXIS 364 at *9 (NLRB ALJ 2002) ("as the Arizona legislation only establishes a framework and process by which state officials may 'charter' schools from among various

private and public applicants, I find that the Academy fails to meet the first *Hawkins* test because the State of Arizona did not directly establish it").

Despite this standard, the Acting Regional Director erroneously relied on various statutes for the proposition that Illinois charter schools are literally "created" by the Illinois General Assembly. However, as explained in CMSA's Petition for Review, none of these statutes literally "created" CMSA. Rather, the Illinois Charter Schools Law simply establishes a procedure by which private individuals can seek approval to run a charter school, not unlike the charter school application and approval process described in several NLRB ALJ decisions. *See Excalibur Charter Sch., Inc.*, 2011 NLRB LEXIS 23 at *7; *C.I. Wilson Academy*, 2002 NLRB LEXIS 364 at *9. Nowhere in the Illinois Charter Schools Law is there a specific directive by the Illinois General Assembly to "create" CMSA, nor any other charter school for that matter. But for the efforts of a group of private individuals, CMSA would never exist (Tr. 14-15; E. Ex. 1). As a result, the application framework described in the Charter Schools Law is insufficient to qualify for the first prong of the *Hawkins County* test.

So, too, the Illinois statutory amendments that declare that charter schools are subject to Illinois' public sector labor law. *See* 115 ILCS 5/2(a). Again, these amendments nowhere direct the creation of a particular charter school, much less CMSA. At most, Section 2(a) of the Illinois Educational Labor Relations Act

("IELRA") declares that "charter schools" fall within the definition of an "educational employer" for labor relations purposes (including for example union non-discrimination and good faith bargaining requirements). *See id.* For obvious reasons, a state's directive to an employer regarding how it must interact with its workforce does not "create" the employer in question. Otherwise, every employer in the country that is subject to a state fair employment law that prohibits workplace discrimination would be "created" by the State. This obviously is nonsensical, and defeats any inference that the IELRA literally "created" CMSA.[2]

Even assuming, *arguendo*, that the Illinois General Assembly intended to "create" CMSA as an arm of the State through the Illinois Charter Schools Law and IELRA, the fact remains that such intent is not controlling for purposes of

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[2] Similarly, the legislative history quoted by the Acting Regional Director at page 7 of his decision does not suggest that the General Assembly somehow "created" CMSA when enacting the IELRA amendments. At most, the legislative quote reflects an intent to regulate how charter schools interact with their employees. Simply announcing an intent to regulate an employer's labor and employee relations does not mean that employer is a public entity. For example, no one would seriously question Ford Motor Company's private employer status if the same legislator pronounced during a floor debate that his intent was to have Ford fall within the jurisdiction of the IELRA. The unreliability of such statements militate against the Board's reliance on them. *See generally United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 N.L.R.B. No. 159 at slip op. 5 n. 14 (2010) (noting Supreme Court's hesitance to rely on an individual legislator's floor debate comment); *cf. Kentucky River Community Care, Inc. v. NLRB*, 193 F.3d 444, 452 (6th Cir. 1999) (NLRB did not err by rejecting former governor's testimony attesting to whether employer was a political subdivision, because "[a]ll the testimony might have provided is one legislator's understanding of the meaning of the statute.").

defining a "political subdivision" under Section 2(2) of the NLRA. While the U.S. Supreme Court declared that such statutory pronouncements *could* be considered as evidence of an employer's government status, the Court very clearly declared that federal law ultimately controlled the determination of "political subdivision" status. *See Hawkins County*, 402 U.S. at 604-05. In the words of the Supreme Court: "Nothing in the [NLRA's] background, history, terms or purposes indicates its scope is to be limited by . . . varying local conceptions, either statutory or judicial, or that it be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems." *Id.* (quoting *NLRB v. Randolph Elec. Membership Corp.*, 343 F.2d 60 (4th Cir. 1965)).[3]

The Supreme Court's concern is demonstrated by the following hypothetical--what if a change in political leadership suddenly prompts the Illinois General Assembly to amend the Illinois Charter Schools Law by removing the word

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[3] Federal courts similarly discount state statutes when determining whether an employer is a state actor for purposes of constitutional liability. For example, in *Caviness v. Horizon Community Learning Ctr., Inc.*, 590 F.3d 806 (9th Cir. 2010), the U.S. Court of Appeals for the Ninth Circuit rejected the plaintiff's argument that a charter school was a government entity, such that it could be held liable for a constitutional due process violation. The Court explained that "a state's statutory characterization of a private entity as a public actor for some purposes is not necessarily dispositive with respect to all of that entity's conduct." *Id.* at 813 (designation of charter school as a "public school" insufficient to establish that the charter school employer was a state actor); *see also Jackson v. Met. Edison Co.*, 419 U.S. 345, 350 (1974) (designation of utility as a "public utility" was insufficient to make the utility a state actor).

"public," and eliminating the term "charter school" from the IELRA's definition of an "educational employer?" Would this mean CMSA and other Illinois charter schools suddenly have become private employers again under the jurisdiction of the NLRA? Before questioning the realism of such a hypothetical, the NLRB need look only to its recent challenge of four state constitutional amendments (*i.e.*, Arizona, South Carolina, South Dakota and Utah) as proof that state legislatures increasingly are willing to modify long established and accepted labor law principles. *See* NLRB General Counsel News Release, *NLRB advises Attorneys General in four states that secret-ballot amendments are preempted by federal labor law* (Jan. 14, 2011).

As the U.S. Supreme Court recognized in *Hawkins County*, state and local legislatures are often driven by ever shifting parochial interests when enacting labor legislation. As such, the rights of employees under the NLRA should not potentially be held hostage by these local interests. Otherwise, an employee's rights under the NLRA could very well change every election cycle, depending on the political party that has gained control of the state's legislative body. *See, e.g.*, Steven Greenhouse, *Strained States Turning to Laws to Curb Labor Unions*, N.Y. TIMES, Jan. 3, 2011 (summarizing various state initiatives to limit public sector collective bargaining rights as being spearheaded by new political leadership);

Karen Tumulty & Ed O'Keefe, *Public Servants Feel Sting of Budget Rancor*, WASH. POST, Dec. 21, 2010.

Obviously, the NLRB would never tolerate a state's attempt to legislate in a way that would exert state jurisdiction over traditional private sector labor issues. *See, e.g., NLRB v. State of N.C.*, 504 F.Supp.2d 750 (D.N.D. 2007) (Board secured injunction of state law that required non-union members to pay a union for costs of processing their grievances); *NLRB v. State of Ill. Dep't of Emp't Sec.*, 988 F.2d 735 (7th Cir. 1993) (Board secured injunction of Illinois statute that impaired employees' receipt of back pay awards under the NLRA); *cf. 520 S. Michigan Ave. Associates, Ltd. v. Shannon*, 549 F.3d 1119 (7th Cir. 2007) (Illinois' hotel room attendant break law preempted by NLRA), *cert. denied*, 130 S. Ct. 197 (2009); *520 S. Michigan Ave. Associates, Ltd. v. Devine*, 433 F.3d 961 (7th Cir. 2005) (Illinois' Employment of Strikebreakers Act preempted by NLRA). Thus, the NLRB should not hesitate in this case to disregard another Illinois law that encroaches on its exclusive jurisdiction for regulating private sector labor relations.

In short, the Board's current interpretation of the first prong of the *Hawkins County* test is an appropriate way to avoid the unreliable and unpredictable actions of state and local legislatures. Rather than relying on a questionable state law definition of an employer as a "public school," the NLRB instead should

follow its precedent in cases such as *Research Found. of the City Univ. of N.Y.*, 337 N.L.R.B. 965 (2002), by requiring proof that a government entity literally "created" the employer in question by legislative enactment, before concluding that employer is a "political subdivision" within the meaning of Section 2(2) of the NLRA. Such a standard naturally will limit the number of employers that qualify for the first prong of the *Hawkins County* test, thereby maximizing the number of employees and employers that will enjoy the protections of the NLRA. *See Holly Farms Corp.*, 517 U.S. at 399 (NLRB "must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach").

## II. The Acting Regional Director Erred In Relying On The Receipt Of Public Funds And Regulatory Oversight As Part Of The Second Prong Of The *Hawkins County* Test

The Acting Regional Director also erred when he concluded that CMSA's Board of Directors was "responsible" to public officials. In this respect, the NLRB recently clarified the proper analysis under this second prong of the *Hawkins County* test:

> In determining whether an entity is "administered" by individuals responsible to public officials or to the general electorate, the relevant inquiry is whether the individuals who administer the entity are appointed by and subject to removal by public officials. . . . Specifically, the Board looks to whether the composition, selection, and removal of the employer's board of

> directors are determined by law or by the employer's own governing documents.
>
> . . .
>
> The ***sole focus*** here, therefore, is on the composition of the Employer's board of directors and to whom the members of the Employer's board are accountable.

*Charter Sch. Admin. Servs., Inc.*, 353 N.L.R.B. at 397 (emphasis added). In light of this directive, the "sole focus" of the second prong of the *Hawkins County* test must be whether an employer's governing body is subject to appointment or removal by a government entity.

The Acting Regional Director avoided this directive by misreading certain aspects of *Charter Sch. Admin. Servs.* According to the Acting Regional Director, the Board at the second prong of the *Hawkins* test looks at a *variety* of factors in order to determine whether a governing board is "responsible to public officials," including but not limited to the extent of public funding, the extent to which expenditures are subject to financial reporting and auditing strictures, and whether the entity is governed by public record and open meetings statutes. *See* Decision at p.12. According to the Acting Regional Director, the Board "did consider the aforementioned factors in" their entirety, and only after this analysis did the Board focus on the appointment and removal of the employer's board of directors. *See id.*

The Acting Regional Director failed to realize, however, that his multi-factored approach was very similar to the ill-fated analysis that was used by the Regional Director in *Charter Sch. Admin. Services, Inc.* *See* 2007 NLRB Reg. Dir. Dec. LEXIS 183 (NLRB Reg. Dir. 2007). Specifically, the Regional Director in *Charter Sch. Admin. Services, Inc.* declared that the Board considers several factors bearing on an entity's relation to the state:

> (1) whether the individuals who administer the Employer in question are appointed or subject to removal by public officials; (2) whether the Employer is publicly or privately funded; (3) whether the budget is subject to approval by any public entity or agent; (4) whether expenditures are subject to any public financial reporting or auditing strictures; (5) whether day-to-day management responsibilities are free from or subject to oversight; and (6) whether the entity is governed by public record or open meetings requirements.

*Id.* at *14-*15 (citations omitted). Yet, as explained above, the NLRB rejected the Regional Director's approach, explicitly declaring that the "sole focus" of the second prong of *Hawkins County* should be on the composition of the employer's board of directors, and to whom the board of directors are held accountable. *See Charter Sch. Admin. Servs., Inc.*, 353 N.L.R.B. at 397.

In a single footnote, the Board briefly mentioned that the employer in *Charter Sch. Admin. Servs.* did not receive public funds directly, did not need public approval for its corporate budget, and was not subject to state "sunshine laws." *See id.* at 398 n.17. However, the Board stated that these facts simply

"reinforced" the conclusion that no government entity was responsible for appointing or removing the members of the employer's governing body. *See id.*

Significantly, this footnote *followed* the Board's declaration that the "sole focus" should be on an employer's governing board. Indeed, only after a thorough analysis of prior case law that focused on the composition of an employer's governing body did the NLRB make its "sole focus" declaration:

> The Board routinely has asserted jurisdiction over private employers who have agreements with government entities to provide certain types of services. For example, in *Research Foundation* . . . the employer was a private, not-for-profit corporation that had a contract with the City University of New York (CUNY), a public university. The Board found, inter alia, that the employer was not an exempt political subdivision where the employer was administered by its own board of directors, whose appointment and removal were governed by the employer's own by-laws, not by any law or statutory provisions. In *Connecticut State Conference Board, Amalgamated Transit Union*, 339 N.L.R.B. 760 (2003) the Board asserted jurisdiction over a private employer that had a contract with the State of Connecticut to provide public bus service, where the employer's managers were not responsible to public officials or the general electorate. In *Enrichment Services Program*, 325 N.L.R.B. 818 (1998), the Board found that a private employer was not an exempt political subdivision where less than a majority of the members of its board of directors were public officials or individuals responsible to the general electorate.
>
> The ***sole focus*** here, therefore, is on the composition of the Employer's board of directors and to whom the members of the Employer's board are accountable.

*Id.* at 397-98 (emphasis added). With this quote, the Board clearly rejected the Regional Director's underlying six-factored analysis.

In short, the Acting Regional Director in this case has made the very same analytical mistake that the Board rejected in *Charter Sch. Admin. Servs.* By extension, the Acting Regional Director's "sole focus" should have been on whether CMSA's governing board is subject to appointment or removal by a government entity like the State of Illinois or the Chicago Public School System.

If the Acting Regional Director had properly applied this standard, he would have found that CMSA clearly satisfies the second prong of the "political subdivision" test. The record evidence indisputably shows that the composition of CMSA's governing board is exclusively established by CMSA's own internal By-Laws. Specifically, Article III.B of the By-Laws sets the size of the governing board at between 5 and 9 members.

No federal, state or local law addresses the composition of an Illinois charter school's governing board. For example, the Illinois Charter School Law does not specify the size of a charter school's governing body, nor does it address the identity of the board members. Similarly, CMSA's charter agreement with CPS does not address the specific number or identities of CMSA's governing board members, except to repeat the minimum number as outlined in CMSA's By-Laws. As Principal Ali Yilmaz explained, however, this provision was inserted simply because that number was already included in CMSA's By-Laws (Tr. 63).

As a result, no government entity can (or has) affected the composition of CMSA's Board of Trustees.

As for the appointment and removal of CMSA board members, it is also undisputed that no government entity has the power to appoint or remove a CMSA Trustee, much less a CMSA employee. Specifically, the Illinois Charter School Law does not address who can appoint or remove a charter school's governing board and/or employees, nor does CMSA's charter with CPS. At most, the charter agreement between CMSA and CPS specifically provides that CMSA does not "serve as the agent, or under the direction and control, of CPS" (E. Ex. 8 at p.21).

Therefore, CMSA's By-Laws are the exclusive source for determining the process for Board appointments and removals. As explained in Article III.C, the CMSA Trustees themselves are responsible for filling Board vacancies by a majority vote (E. Ex. 4). Board members are also authorized to remove one of their fellow board members (E. Ex. 4). As Principal Yilmaz explained: "[t]he board member who is leaving the board proposes a replacement for themselves, and the board approves the . . . proposal or not. So the board has the ultimate authority to decide . . .who is going to be on the board" (Tr. 29).

CMSA is also exclusively responsible for hiring and/or terminating all of its employees. No government entity has the authority to, or plays a role in, the

appointment or termination of any CMSA employees, including for example in the interview and hiring of teachers (Tr. 96).

Instead of analyzing CMSA's governing board, the Acting Regional Director focused part of his attention on the fact that CMSA receives approximately 80 percent of its operating revenues from government entities. *See* Decision at p.13. However, the Board has held that the receipt of such government revenue is not enough to transform an employer into a "political subdivision." *See Family Healthcare, Inc.*, 354 N.L.R.B. No. 29 at slip op. 2 (employer not a "political subdivision" despite the fact that it derived over 80 percent of its funding from government grants and Medicare and Medicaid reimbursements); *Connecticut State Conference Bd., Amalgamated Transit Union*, 339 N.L.R.B. 760, 763 (2003) (public bus transit system operator was not a political subdivision, despite the fact that *all* operating revenues were supplied by the Connecticut DOT); *Minneapolis Society of Fine Arts*, 194 N.L.R.B. 371, 372 (1971) (noting that an employer "does not become a creature of the State by the mere receipt of revenue from a state-established tax fund"). Such a conclusion makes sense, where many government contractors receive the vast majority of their gross revenue from a government entity. *See, e.g.*, GRANT THORNTON, 16TH ANNUAL GOVERNMENT CONTRACTOR INDUSTRY SURVEY HIGHLIGHTS BOOK at 5 (responding contractors reported that, on average, 94% of their revenue came from federal agencies).

In the constitutional context, the U.S. Supreme Court has similarly rejected the notion that government funding transforms a private employer into a government entity. In *Rendell-Baker v. Kohn*, 457 U.S. 830, 832 (1982), a school operated as a not-for-profit organization that specialized "in dealing with students who have experienced difficulty completing public high schools." The school was founded "as a private institution," and was operated by a board of directors who were neither public officials nor chosen by public officials. *See id.* Student's tuition was publicly funded, and public funds accounted for 90 to 99 percent of the school's operating budget. *See id.*

Despite the fact that the school's operating budget in *Rendell-Baker* came almost entirely from state funds, the Supreme Court nevertheless ruled that the school was not a state actor for constitutional liability purposes. Rather, it simply was a contractor that performed a service at the public expense, which was "in no way . . . the exclusive province of the State." *Id.* at 842.

The Acting Regional Director also erred to the extent that he suggested extensive government oversight and regulation by the Chicago Public School System transforms an otherwise private employer like CMSA into a "political subdivision." The U.S. Court of Appeals for the Sixth Circuit rejected such a notion in *Kentucky River Community Care, Inc. v. NLRB*, 193 F.3d 444 (6th Cir. 1999), *aff'd in relevant part*, 532 U.S. 706 (2001). There, the Court affirmed the

Board's view that even *extensive* control by a government entity over the labor relations and personnel actions of an employer does not render the employer a "political subdivision:"

> KRCC argues, first, that because the Secretary of the Cabinet for Human Resources has significant control over KRCC's operations, KRCC is an organization run by individuals responsible to public officials. Specifically, the Secretary has authority to appoint a caretaker for KRCC and make personnel changes without the consent of the corporation's board. In addition, the Secretary has authority to review and disapprove of the board's personnel policies and compensation plans. The Cabinet for Human Resources also dictates the services KRCC will provide and how many employees KRCC will need. Therefore, KRCC claims, it is responsible to the Secretary of the Cabinet for Human Resources.
>
> To be sure, the Secretary of the Cabinet for Human Resources exercises significant oversight of KRCC's operations. The oversight arises because KRCC has sought recognition as a local mental health-mental retardation board, but it does not necessarily follow that such oversight means that the individuals in charge at KRCC are responsible to public officials. We find nothing in the oversight authority of the Cabinet for Human Resources or in the internal structure of the KRCC that makes the individuals in charge at KRCC responsible to the Cabinet for Human Resources.

*Id.* at 451. Two Board ALJs have reached similar conclusions in the charter school context. While charter schools may be subject to "significant oversight" by a state agency, this does not transform a government contractor into a "political subdivision." *See Excalibur Charter Sch., Inc.*, 2011 NLRB LEXIS 23 at *8-*9 ("although the State Board exercises significant oversight over the operations of the Respondent and all charter schools in the state, the day to day operation of

the school including the hiring and firing of teachers and other employees, is handled by [the school administrators]. I therefore find that the Respondent is an employer within the meaning of Section 2(2) of the Act."); *C.I. Wilson Academy, Inc.*, 2002 NLRB LEXIS 364 at *13 - *14 (same). The U.S. Supreme Court has reached a similar conclusion in the constitutional liability context, where "the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State." *American Mfg. Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999).

In this matter, the oversight exercised by the Chicago Public School System over CMSA does not even come close to the extensive regulation over internal personnel matters as seen in *Kentucky River Community Care*. For example, almost every CMSA reporting requirement that was addressed during the hearing had nothing to do with employee terms and conditions of employment. Rather, they almost all concerned the "business" of a charter school, *i.e.*, the extent of student learning and/or the basis for determining the proper amount of school funding:

- Entering student attendance records directly into a CPS computer system called "Impact" on a daily basis (Tr. 64-65); Ali Yilmaz explained the purpose of reporting these attendance records was to show compliance with federal attendance standards (Tr. 65).
- Submitting a school calendar to CPS (Tr. 71); CPS has never rejected or revised the school calendar upon submission (Tr. 71).

- Submitting CMSA Board meeting minutes, along with the dates, times and locations of the Board meetings (Tr. 72, 75).
- Submitting CMSA's student disciplinary policy (if CMSA has declined to use CPS' policy) (Tr. 72).
- Submitting an application to CPS in order to qualify for free and reduced meals (Tr. 73).
- Submitting an annual financial and compliance audit (Tr. 74).
- Submitting the specifications for a student lottery system when there are more student applicants than open spots (Tr. 74-75).
- Submitting information regarding the expulsion of students, so that CPS can ensure that the expulsion meets due process requirements (Tr. 75-76).
- Submitting a report when a student has voluntarily transferred out of the school (Tr. 77).

As Principal Yilmaz explained during the hearing, many of these reporting requirements are intended merely as a way for CPS to monitor whether CMSA is complying with its various contractual promises (Tr. 65-66, 72). In this regard, CPS essentially serves a "regulatory" role by ensuring that CMSA meets certain contractual goals that were outlined in its renewal application and charter agreement. At the same time, CPS does not interfere with one of the central aspects of CMSA's operations, *i.e.*, curriculum development (Tr. 97). Rather, CMSA in conjunction with Concept Schools helps establish student curriculum standards (Tr. 97).

Finally, the Board and federal courts have ruled that other government controls over a private employer do not transform the employer into a government entity. *See, e.g., FiveCAP, Inc.*, 331 N.L.R.B. 1165, 1168 (2000), *aff'd*, 294 F.3d 768 (6th Cir. 2002) ("The fact that the Respondent is required to keep financial records and to make them available for public inspection signifies only that the Respondent is a recipient of public funds and that it is therefore required to account for those funds to the public. The mere receipt of public funds with the requirement that the Respondent account to the public for the spending of those funds, however, does not establish that the Respondent is a political subdivision."); *Caviness*, 590 F.3d at 817 (participation of charter school's teachers in a state retirement fund did not render charter school a state actor for constitutional liability purposes); *Charter Sch. Admin. Servs., Inc.*, 353 N.L.R.B. at 398 n.20 ("the ability of the government to correct or cancel a contract does not, without more, change the private nature of the contracting entity").

As the above cases demonstrate, government regulation and the receipt of government funds are insufficient, by themselves, to transform an otherwise private employer into a "political subdivision" pursuant to the second prong of the *Hawkins County* test. The Board therefore should continue to follow *Charter Sch. Admin. Servs., Inc.* by requiring the "sole focus" of the second prong of *Hawkins County* to be the appointment and accountability of an employer's

governing board. Such a standard will help avoid the inconsistent approaches taken by a number of the Board's Regional Directors and ALJs in recent years. *Compare Excalibur Charter Sch., Inc.*, 2011 NLRB LEXIS 23 at *8 - *9 (charter school not a "political subdivision" within the meaning of the Act); *with Los Angeles Leadership Academy*, Case No. 31-RM-1281 (2006) (erroneously relying, in part, on extensive state regulation to find charter school was a "political subdivision").

## III. The Board Should Not Deprive Employees Of The Protections Of The NLRA By Now Broadly Interpreting The Meaning Of "Political Subdivision"

When interpreting the meaning of "political subdivision" as used in Section 2(2) of the NLRA, the Board cannot overlook the U.S. Supreme Court's admonition that "administrators . . . must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp.*, 517 U.S. at 399. To a large extent, the Board has in recent years followed the Supreme Court's guidance by restricting the application and meaning of "political subdivision."

In the wake of the U.S. Supreme Court's *Hawkins County* two-prong test, the NLRB in 1975 expanded the scope of what constitutes a "political subdivision" by creating the so-called "intimate connection" test. With this test, the Board was willing to designate government contractors as "political subdivisions," even though they were neither directly created by a governmental entity, nor held

accountable by a public entity. *See Rural Fire Prot. Co.*, 216 N.L.R.B. 584 (1975). According to the Board: "[w]here the services are intimately connected with the exempted operations of the institution, the Board has found that the contractor shares the exemption; on the other hand, where the services are not essential to such operations the Board has found that the contractor is not exempt and asserts jurisdiction over the contractor's activities." *Id.* at 586 (quoting *Herbert Harvey, Inc.*, 171 N.L.R.B. 238 (1967)). In this respect, the "intimate connection" test had a much broader reach than the test employed today.

Over the years, however, the Board's "intimate connection" test seemingly morphed into the so-called "right of control" test, which analyzed "whether the employer [had] sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative." *National Transp. Serv., Inc.*, 240 N.L.R.B. 565, 565 (1979). With this test, the NLRB was willing to decline jurisdiction over those employers who were extensively regulated by governmental entities, even though the employer itself might not qualify as a "political subdivision." *See, e.g., Res-Care, Inc.*, 280 N.L.R.B. 670, 670 n.1 (1986) (declining jurisdiction over a company that operated residential job corps centers, because of extensive regulation by the U.S. Department of Labor).

In 1995, the NLRB abandoned these tests in favor of a more straight-forward (and restrictive) application of the *Hawkins County* two-prong test. In *Management Training Corp.*, 317 N.L.R.B. 1355, 1355 (1995), the Board announced that the "right of control" test was "unworkable and unrealistic." Instead, the Board began applying the *Hawkins County* two-prong test in a strict manner, without permitting government contractors to escape NLRA jurisdiction simply because a government agency exerted some level of control over its operations. *See also Jacksonville Urban League, Inc.*, 340 N.L.R.B. 1303, 1304 n.4 (2003) (declining to reinstate the "right of control" test).

As this summary demonstrates, the Board has gradually tightened its jurisdiction over employers by eliminating the ways a government contractor can escape NLRA coverage. With its recent *Charter Sch. Admin. Servs.* case, the NLRB has again clarified that regulatory oversight, by itself, is not enough to deprive employees of NLRA protections. Rather, at the second prong of *Hawkins County*, the "sole focus" should be on the appointment and accountability of an employer's governing body.

Clearly, the receipt of government funds and imposition of government regulations, by themselves, no longer qualify an employer as a "political subdivision." In this respect, the Acting Regional Director's emphasis on the "extent of control" that the Chicago Public School System exercises over CMSA is

eerily reminiscent of the earlier "intimate connection" and "right of control" tests from the 1970's and 1980's. CMSA respectively submits that there is no reason for the Board to now retreat from its current position by re-instituting a multi-factored approach that is admittedly "unworkable and unrealistic." *See Management Training Corp.*, 317 N.L.R.B. at 1355.[4]

## CONCLUSION

CMSA respectfully requests that the Board reverse the Acting Regional Director's decision, and find that CMSA is an "employer" within the meaning of Section 2(2) of the Act.

Respectfully submitted,

**CHICAGO MATHEMATICS AND SCIENCE ACADEMY CHARTER SCHOOL, INC.**

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[4] Interestingly, CMSA would still not qualify as a "political subdivision" even if the discredited "right of control" test was applied. As explained above, CMSA *exclusively* controls almost all facets of its employees' wages, hours and terms and conditions of employment, such that the Chicago Public School System would have minimal impact (if any) on the bargaining relationship between CMSA and a union.

## CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he caused a true and correct copy of the PETITIONER-EMPLOYER'S BRIEF to be served upon the following individuals by electronic service on this 11th day of March, 2011.

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